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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

LONNY DEATLEY,

Plaintiff and Appellant,

v.

CITY OF MODESTO et al.,

Defendants and Respondents.

F057159

(Super. Ct. No. 623366)

OPINION

APPEAL from a judgment of the Superior Court of Stanislaus County. David G. Vander Wall, Judge.

Lonny Jo DeAtley, in pro. per., for Plaintiff and Appellant.

Susana Alcala Wood, City Attorney and James F. Wilson, Deputy City Attorney, for Defendants and Respondents.

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Plaintiff appeals from a judgment in favor of defendant, City of Modesto (City), entered after City's demurrer to plaintiff's first amended complaint was sustained without

leave to amend. Plaintiff challenges only the form of the judgment entered, and the procedure by which it was entered. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff filed a complaint against City for false imprisonment, negligent infliction of emotional distress, and intentional infliction of emotional distress. Defendant's demurrer to the complaint was sustained with leave to amend. Plaintiff failed to amend within the prescribed time, and defendant requested and obtained entry of a judgment of dismissal. Plaintiff's motion to vacate the dismissal was granted, and he filed a first amended complaint. Defendant again demurred. Plaintiff opposed the demurrer. On November 13, 2008, after hearing argument, the court sustained the demurrer without leave to amend. Defendant submitted to the court and served on plaintiff a proposed order and judgment. The court signed this judgment and it was filed on January 2, 2009. Plaintiff then submitted to the court a proposed order sustaining the demurrer without leave to amend; his order did not include a judgment. The court returned plaintiff's proposed order with a note indicating the judgment had already been signed by the court.

Plaintiff appeals from the judgment entered on January 2, 2009. He raises no issue regarding the sufficiency of his pleading or the propriety of the ruling on defendant's demurrer. Instead, he presents two issues regarding the judgment itself: whether the judgment was properly entered against him without a noticed motion and whether the judgment entered was in proper form.

DISCUSSION

I. Entry of Judgment

"The court may dismiss [a] complaint as to [the demurring] defendant[,] when ... a demurrer to the complaint is sustained without leave to amend and either party moves for dismissal." (Code Civ. Proc., § 581, subd. (f)(1).) "[A]fter a demurrer is sustained without leave to amend, ... no formal motion to dismiss the action is necessary. The entry of a judgment of dismissal follows as a matter of course." (*Berri v. Superior Court*

of *San Francisco* (1955) 43 Cal.2d 856, 860; accord, *Michaels v. Mulholland* (1953) 115 Cal.App.2d 563, 564.) Generally, a noticed motion is required when the order requested may affect the rights of an adverse litigant. (*Oppenheimer v. Deutchman* (1955) 132 Cal.App.2d Supp. 875, Supp. 879.) When a demurrer is sustained without leave to amend, “[t]he judgment of dismissal ... does not affect the right of adverse litigants because the losing party has already had his hearing. The statute itself [citation] does not require notice.” (*Ibid.*) The statutory requirement that a party move for dismissal simply means the court cannot dismiss the action without the request of a party. (*Ibid.*)

The trial court sustained City’s demurrer to plaintiff’s first amended complaint without leave to amend. City then requested entry of judgment by submitting a proposed order and judgment to the court. The court signed and filed the proposed order and judgment. No noticed motion to dismiss was required. The trial court followed the proper procedure and we find no error.

II. Form of Judgment

Plaintiff contends no judgment has yet been entered against him because only a judgment of dismissal is authorized after the sustaining of a demurrer without leave to amend, and the judgment entered does not refer to a “dismissal.” “The interpretation of the effect of a judgment is a question of law within the ambit of the appellate court.” (*John Siebel Associates v. Keele* (1986) 188 Cal.App.3d 560, 565 (*John Siebel*).)

An appeal may be taken from a judgment. (Code Civ. Proc., § 904.1, subd. (a)(1).) In determining whether there is a final, appealable judgment, “the question ... is not what the form of the order or judgment may be, but what is its legal effect.” (*Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695, 698-699 (*Daar*).) “All dismissals ordered by the court shall be in the form of a written order signed by the court and filed in the action and those orders when so filed shall constitute judgments and be effective for all purposes, and the clerk shall note those judgments in the register of actions in the case.” (Code Civ. Proc., § 581d.) “The form of the judgment is of no consequence so long as it

may be ascertained therefrom what rights, if any, of the respective parties in the action have been determined by the court. The test of its sufficiency must rest in its substance rather than its form. [Citations.]’ [Citations.]” (*Pista v. Resetar* (1928) 205 Cal. 197, 200.)

In *Schisler v. Mitchell* (1959) 174 Cal.App.2d 27 (*Schisler*), defendant’s demurrer to plaintiff’s first amended complaint was sustained without leave to amend. The subsequently entered judgment stated: “‘Now, therefore, it is ordered, adjudged and decreed that the plaintiff take nothing by this action and that said defendant have and recover her costs herein taxed at \$12.50.’” (*Id.* at p. 28.) Plaintiff’s notice of appeal was not timely filed after entry of this judgment. Defendant moved to dismiss the appeal. Plaintiff argued the judgment was not a judgment of dismissal and therefore did not finally dispose of the action after the demurrer was sustained without leave to amend. He contended his notice of appeal was prematurely filed and would not be effective until a judgment of dismissal was entered by the trial court. (*Ibid.*)

The court rejected plaintiff’s argument, stating:

“It is well settled law that an order sustaining a demurrer without leave to amend is nonappealable, and a formal judgment must be entered against the unsuccessful party from which the appeal can be taken. [Citations.] Quite commonly judgments entered upon demurrers are denominated ‘Judgment of Dismissal.’ [Citations.] We have found no authority holding that such a judgment must, in explicit terms, dismiss the action. [¶] A judgment of dismissal in this context is one terminating a case without a trial of the issues of fact involved. [Citations.] In *Saddlemire v. Stockton Savings etc. Soc.*, 144 Cal. 650, 655-656, the court equated a judgment of dismissal with a judgment providing that the unsuccessful party shall take nothing by his action. It has been held that a dismissal as such is not required. [Citation.]” (*Schisler, supra*, 174 Cal.App.2d at pp. 28-29.)

Considering the substance of the words used, rather than their form, the court concluded the judgment amounted to a final, appealable judgment. Because plaintiff’s notice of appeal was not filed within the prescribed time after entry of the judgment, the court dismissed the appeal. (*Schisler, supra*, 174 Cal.App.2d at pp. 29-30.)

In *Daar*, plaintiff sued on behalf of himself and all other persons similarly situated. The superior court entered an order sustaining defendant's demurrer to the complaint without leave to amend and transferring the matter to the municipal court. (*Daar, supra*, 67 Cal.2d at p. 698.) The order was based on the court's determination plaintiff could not maintain the action as a class action and his individual claim did not allege damages within the jurisdiction of the superior court. Plaintiff appealed, and the court determined the order was appealable. The court based its decision on the substance and legal effect of the order, rather than its form. (*Id.* at pp. 698-699.)

“Although an order sustaining a demurrer with or without leave to amend is not the final judgment in the case [citation] and is nonappealable [citations], here the order under examination not only sustains the demurrer, but also directs the transfer of the cause from the superior court, where it was commenced as a class action, to the municipal court.... [The order] determines the legal insufficiency of the complaint as a class suit and preserves for the plaintiff alone his cause of action for damages. In ‘its legal effect’ [citation] the order is tantamount to a dismissal of the action as to all members of the class other than plaintiff. [Citations.] It has virtually demolished the action as a class action. If the propriety of such disposition could not now be reviewed, it can never be reviewed. This court has observed that it ‘has long been the rule in this state that an order of dismissal is to be treated as a judgment for the purposes of taking an appeal when it finally disposes of the particular action and prevents further proceedings as effectually as would any formal judgment.’ [Citations.] We conclude that the order in the case at bench is in legal effect a final judgment from which an appeal lies.” (*Daar, supra*, 67 Cal.2d at p. 699.)

The judgment entered in this case provides that judgment shall be entered in favor of City and against plaintiff, “who shall take nothing by his first amended complaint.” The judgment was entered after the court sustained City's demurrer to the first amended complaint without leave to amend. Considering the substance of the judgment, in the context of the whole record,¹ it is clear the judgment was intended to finally dispose of

¹ “In case of doubt regarding the meaning or consequence of a judgment, or any part of it, the whole record may be examined to ascertain the meaning. [Citations.]” (*John Siebel, supra*, 188 Cal.App.3d at p. 565.)

the action, without a determination on the merits, because the first amended complaint failed to state a cause of action. Thus, it is, in effect, a judgment of dismissal. It became final and appealable at the time of entry in the register of actions. (Code Civ. Proc., § 581d.) Plaintiff has not established any error by the trial court in the entry of judgment.

III. Prejudice

“No judgment ... shall be reversed ... by reason of any error ... or defect, unless it shall appear from the record that such error ... or defect was prejudicial, and also that by reason of such error ... or defect, the said party complaining or appealing sustained and suffered substantial injury, and that a different result would have been probable if such error ... or defect had not occurred or existed.” (Code Civ. Proc., § 475.) “‘The burden is on the appellant in every case to show that the claimed error is prejudicial; i.e., that it has resulted in a miscarriage of justice.’ [Citation.] Injury is not presumed from error, but injury must appear affirmatively upon the court’s examination of the entire record. ‘But our duty to examine the entire cause arises when and only when the appellant has fulfilled his duty to tender a proper prejudice argument. Because of the need to consider the particulars of the given case, rather than the type of error, the appellant bears the duty of spelling out in his brief exactly how the error caused a “miscarriage of justice.”’ [Citation.]” (*In re Marriage of McLaughlin* (2000) 82 Cal.App.4th 327, 337.)

Plaintiff has not “‘tender[ed] a proper prejudice argument.’” (*McLaughlin, supra*, 82 Cal.App.4th at p. 337.) He has not identified any prejudice or injury he suffered as a result of the entry of a judgment that was not expressly identified as a judgment of dismissal. He has not demonstrated that the form of the judgment resulted in a miscarriage of justice. Consequently, even if plaintiff had demonstrated an error in the form of the judgment, we would have no grounds for reversal because of the absence of a showing of prejudice.

DISPOSITION

The judgment is affirmed. City is awarded its costs on appeal.

HILL, J.

WE CONCUR:

CORNELL, Acting P.J.

POOCHIGIAN, J.